

*United States Court of Appeals  
for the Second Circuit*



**APPELLANT'S  
BRIEF &  
APPENDIX**



76-1314

76-1314

To be argued by  
DAVID N. WEISBAND

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In The

United States Court of Appeals  
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee

vs.

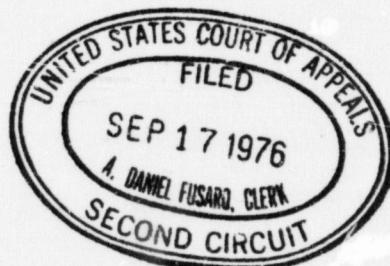
SERAFINO SALIDINI

Defendant-Appellant.

Appeal from Judgment of United States  
District Court for the Southern  
District of New York

BRIEF AND APPENDIX OF DEFENDANT-  
APPELLANT

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To be argued by  
DAVID N. WEISBAND

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT  
Docket No. 76-1314

-----x

UNITED STATES OF AMERICA,

Appellee,

-against-

SERAFINO SALIDINI,

Defendant-Appellant.

-----x

BRIEF OF DEFENDANT-APPELLANT  
SALADINI

STATEMENT

Defendant-appellant SALIDINI appeals to this Court from a judgment of the United States District Court for the Southern District of New York, rendered the 8th day of July, 1976, convicting him of five counts of an indictment, four of which charged violations of the narcotics laws, and the fifth accused him of carrying a firearm during the commission of the felonies set forth in Counts One through Four, after trial before Cannella, J., and a jury.

The Trial Judge sentenced the defendant-appellant, on Counts One through Four inclusive, to imprisonment for

five years, plus a special parole of three years to follow, all to run concurrently with each other. On the Fifth Count, namely the use of a firearm during the commission of a felony, Judge Cannella sentenced SALADINI to serve one year imprisonment, consecutively, to Counts One through Four.

#### INTRODUCTORY

It is submitted that the judgment herein against SALADINI should be reversed on the grounds that there is insufficient evidence as a matter of law to have warranted his conviction.

Moreover, at the very most, he may have been a casual facilitator, but we submit the evidence does not establish that he was involved in the conspiracy or in any of the substantive acts.

The indictment charged SALADINI, together with John Buckley and James Brady, with violations of Sections 812 and 841 of the Narcotics Laws, in that they conspired from January 3, 1976 to May 21, 1976, to knowingly and intentionally distribute and possess, with intent to distribute, a Schedule 1 narcotic drug, namely heroin.

Prior to trial Brady jumped bail. Buckley pleaded guilty to Count Four and turned a Government witness against SALADINI.\*

2.

\*SALADINI was offered a plea bargain to plead guilty to Count Five in satisfaction of the indictment, but refused to do so and went to trial.

In the colloquy, prior to the plea of guilty by defendant Buckley, he was asked what he had done with respect to participation in the crime charged. At page 17 of the minutes of May 19, 1976, Buckley responded, inter alia:

"I picked up James Brady in my cab..it was prearranged, he had heroin on him..and drove him to a restaurant where we were to meet the agents and sell it."

It is to be noted that at no time did he mention SALADINI's name.

The case, with respect to SALADINI, merely indicated that while on one or two occasions he was present or had participated in a general conversation, there was no definite evidence that he actually participated and made himself part of a conspiracy to violate the Narcotics Laws, or that he did in fact violate Narcotics Laws.

#### THE EVIDENCE

Special Agent Joseph Sullivan, attached to the Drug Enforcement Administration, testified that acting as a special undercover agent, on February 11, 1976, together with,

a federal informant, he met co-defendant Buckley, and arranged for the purchase of one ounce of heroin. At this time, he saw two males approaching the car, and stated that these individuals were SALADINI, and the other was Brady, the latter having jumped bail before trial.

On cross-examination Sullivan declared that he never saw SALADINI pass anything to Buckley and that after making phone calls, Buckley stated to Sullivan, after driving around for a while, "he could not find his man", although he saw Buckley speaking with two males whom he identified as Brady and SALADINI. The agent stated he could not tell with which defendant Buckley spoke, and again stated several times that at no time did he see SALADINI pass anything to Buckley.

With respect to another alleged transaction on February 20, 1976, Agent Sullivan declared he never saw defendant-appellant SALADINI at all that night.

With respect to the third proposed sale which was to take place on March 8, 1976, Agent Sullivan conceded that at no time that evening did Buckley say that he was getting heroin from SALADINI, but merely he was going to get his supply that night from "his guy", and not his "guys" and, in fact, never mentioned the name of SALADINI at all.

Defendant Buckley, who was testifying as a Government witness during the trial, declared that in the middle of January, 1976, defendant-appellant SALADINI called him, informing Buckley that Brady was in New York, and subsequently both SALADINI and Brady came to Buckley's apartment. Brady exhibited some packets of alleged heroin to Buckley, which Brady offered to Buckley for distribution. SALADINI was present, but according to Buckley, was walking back and forth in the apartment, and merely stated that it "was pretty good stuff and better than the garbage being sold on the streets of New York".

February 11, 1976, Buckley again met Agent Sullivan at the Apollo Restaurant and phoned SALADINI's residence. SALADINI answered, but Buckley asked to speak to Brady, who got on the telephone. A deal was then arranged and they were to meet at a particular place.

Throughout the transaction, however, Buckley clearly indicated that Brady was the prime mover and that SALADINI was dissatisfied with the entire deal, stating that he got nothing out of the deal and, in fact, testified that when making the several phone calls to SALADINI's residence

that night, whenever SALADINI answered, he told Buckley that he would have to speak to Brady. In fact, Brady made all the arrangements and whatever heroin was passed that night to Buckley, came from Brady and not SALADINI.

Buckley further asserted that SALADINI told him that he did not make a dime on the deal.

Buckley testified (105)\* that SALADINI complained that Buckley was making far more than he was and that he was not getting a dime out of this deal and was hoping that Brady was going to give him some money that night.

With respect to February 20, 1976, Buckley recalled that arrangements were made with Sullivan to meet the informant and Brady. At no time was any arrangement made that night with SALADINI.

With respect to the third sale, which took place on March 8, 1976, Buckley testified again that all arrangements were made on the telephone with Brady and not SALADINI.

Buckley testified further that Brady was the principal mover of the heroin and that his dealings were with Brady.

6.

\*Numerals in parentheses refer to pages of the official court reporter's minutes of trial, unless otherwise specified.

He stated on one occasion, when he did give money to SALADINI, it was with the understanding that it was going to go to Brady.

Agent Lawlor also testified, but he, too, did not specifically incriminate SALADINI as to any actual transaction involving heroin, only asserting that he observed SALADINI continually looking over his shoulder on the night of March 8, 1976.

On February 20th, Lawlor stated, he did not see SALADINI at all.

On February 11, 1976, he stated that he could not describe the defendant, SALADINI, as one of the people whom he observed with Buckley.

Agent Aponte was fairly consistent with the testimony of Lawlor, and did not specifically involve the appellant SALADINI in any specific transaction.

Agent Moran declared that at no time did he ever see Buckley pass anything to the appellant. Moreover, he stated that when the defendant-appellant was arrested on March 8th, he found no heroin on his person at all.

Agent Costanzo testified that on March 8th he saw defendant-appellant crouching between cars, but did not see him participate in any narcotics transaction. SALADINI

was arrested later that night and among the items removed from his person was a matchcover book with the license plate of Agent Sullivan's car written on it.

Agent Costanzo also admitted that he never saw defendant-appellant pass anything to Buckley on the night of February 11th, when he saw SALADINI sitting on the stoop.

At the end of the Government's case, the defendant-appellant's counsel, assigned counsel, asked for an order dismissing the indictment on the grounds that there was no evidence tying the defendant in with the commission of any of the crimes committed by Brady or Buckley. At best, defendant was on the periphery, and not actually engaged in the crime. (275-277)

A special motion was made to dismiss Count Three on the grounds that there was no evidence at all concerning SALADINI on the February 20th transaction.

The Court denied all the motions. (277)

A number of requests to charge were submitted to the Trial Court, and the Trial Court denied many of them. We believe that this was error.

The defendant-appellant did not take the stand, nor did he call any witnesses on his behalf.

POINT I

THERE WAS INSUFFICIENT EVIDENCE AS A MATTER OF LAW TO HAVE WARRANTED THE SUBMISSION OF THIS CASE TO A JURY. THE COURT SHOULD HAVE GRANTED THE MOTION MADE BY APPELLANT'S COUNSEL TO DISMISS AT THE CLOSE OF THE GOVERNMENT'S CASE. AT MOST, SALADINI WAS A CASUAL FACILITATOR.

A review of the testimony in this case, we submit, reveals that SALADINI did not participate in the transactions enumerated in the indictment. While he was present on two of the three occasions set forth, namely February 11th and March 8th, there is no credible evidence that he was involved in a narcotics transaction.

Co-defendant Buckley, who testified for the prosecution, admitted that his dealings were primarily with Brady. He also conceded that on more than one occasion the appellant had told him that he was not getting any money whatsoever out of this deal.

\* There is also testimony that at one point the defendant-appellant asserted to Buckley that this heroin was good and was not garbage. That in itself would not make him a participant in the crime.

It is elementary that with respect to the law of conspiracy, which has been referred to as the "darling of the prosecutor's nursery", this Court has held on many occasions, most notably in the case of UNITED STATES v. PEONI, 100 F.2d 401 at 403 [Judge Learned Hand], "Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it."

In UNITED STATES v. ANDOLSCHEK, 142 F. 2d 503, 507 (2nd Cir. 1944):

"It is true that at time courts have spoken as though, if A. makes a criminal agreement with B., he becomes a party to any conspiracy into which B. may enter, or may have entered, with third persons. That is of course an error; the scope of the agreement actually made always measures the conspiracy, and the fact that B. engages in a conspiracy with others is as irrelevant as that he engages in any other crime. (emphasis ours.)

The prosecutor used the vehicle of conspiracy to try to admit evidence that otherwise could not be admitted. Thus in UNITED STATES v. FALCONE, 109 F. 2d 579 (2nd Cir. 1940, Aff'd. 311 U. S. 205 (1940), Judge Learned Hand aptly declared (id 581):

"[The accused] must in some sense promote their venture himself, make it his own, have a stake in its outcome . . .".

Then he cautioned the Courts and prosecutors (id 581):

". . . today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders . . . there are opportunities of great

oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided".

(emphasis ours.)

It is clear that there was no evidence that the defendant-appellant herein participated in the conspiracy. He had nothing whatsoever to do with the passing of the drugs. There was no evidence that he in any way made the transactions his own or that he knowingly and intentionally participated in a conspiracy. He was present, true, but more than mere presence is required to enmesh someone in a conspiracy. SALADINI, at most, was a casual facilitator.

It's true he answered the telephone and it is also accurate that he was present in the street. Buckley's statements, however, that he received nothing whatsoever from the transactions, would indicate that he did not participate as a co-conspirator in those events.

There is no evidence that the appellant herein made this venture his own or had any stake in its outcome. (UNITED STATES v. FALCONE, *supra*). See also, UNITED STATES v. HYSOHION, 2 Cir. 1971, 448 F.2d 343.

In UNITED STATES v. HYSOHION, *supra*, this Court determined that where a person is a "mere casual facilitator" he cannot be deemed a co-conspirator. Thus, at 347 of 448 F.2d this Court explained:

"We hold that this finding so jeopardizes Rimbaud's conviction on the conspiracy count as to require us to order his acquittal on that count also. We think that the district court's finding that Rimbaud was no more than 'a mere casual facilitator' negates the court's finding that Rimbaud conspired to facilitate the Roupinian-Everett sale. While it is true that one co-conspirator need not actually personally deal in or custodially possess the narcotics themselves, the Government must prove an 'unlawful agreement and an overt act committed in pursuance of the agreement.' United States v. Agueci, 310 F.2d 817, 828 (2 Cir. 1962), cert. denied, Giippone v. United States, 372 U.S. 959, 83 S.Ct. 1013, 10 L.Ed.2d 11 (1963). We find no evidence in the record and nothing in the findings below which would support the existence of an unlawful agreement. The fact that Rimbaud told Everett, a willing buyer, how to make contact with a willing seller does not necessarily imply that there was an agreement between that seller, who was Roupinian, and Rimbaud."

In UNITED STATES v. TAYLOR, (2 Cir. 1972), 464 F.2d

240, the Court overruled the so-called "Second Circuit rule" first enunciated by Judge Learned Hand in UNITED STATES v. FEINBERG, 140 F.2d 592, 594. In TAYLOR this Court stated, *inter alia*, in 464 F.2d at 242:

It is, of course, a fundamental of the jury trial guaranteed by the Constitution that the jury acts, not at large, but under the supervision of a judge. See Capital Traction Company v. Hof, 174 U.S. 1, 13-14, 19 S.Ct. 580, 43 L.Ed. 873 (1899). Before submitting the case to the jury, the judge must determine whether the proponent has adduced evidence sufficient to warrant a verdict in his favor. Dean Wigmore considered, 9 Evidence § 2494 at 299 (3d ed. 1940), the best statement of the test to be that of Mr. Justice Brett in Bridges v. Raiway Co. [1874] L.R. 7 H.L. 213, 233:

[A]re there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the Plaintiff is bound to maintain?

It would seem at first blush--and we think also at second--that more 'facts in evidence' are needed for the judge to allow men, and now women, 'of ordinary reason and fairness' to affirm the question the proponent 'is bound to maintain' when the proponent is required to establish this not merely by a preponderance of the evidence but, as all agree to be true in a criminal case, beyond a reasonable doubt. Indeed, the latter standard has recently been held to be constitutionally required in criminal cases. *I re Winship*, 397 U.S. 358, 361-364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). We do not find a satisfying explanation in the Feinberg

opinion why the judge should not place this higher burden on the prosecution in criminal proceedings before sending the case to the jury."

We must bear in mind that the testimony in the case dealt with three primary transactions, namely those occurring on February 11th, February 20th, and March 8th, 1976.

A perusal of the testimony reveals that SALADINI was not involved.

The Court will recall that in the middle of January, 1976, a meeting was held in Buckley's apartment, when defendant-appellant and Brady were present. The deal which was proposed, however, was strictly between Brady and Buckley and not SALADINI.

Not one of the agents ever testified that they saw Mr. Saladini hand any packets or tin foils of heroin to Mr. Buckley.

On February 20th, nobody saw Mr. Saladini anywhere.

On March 8th, there was no specific testimony against SALADINI, other than that he was crouching near a car. One agent declared that he saw SALADINI walking briskly. Another stated he saw him walking normally and,

in fact, he was in a crouched position writing, or appeared to be writing.

The testimony of one agent with respect to a matchbook cover, wherein a license plate was written, which was found on SALADINI's person, does not make him a member of a conspiracy concerning narcotics. He could have borrowed the matchbook cover or, even if he didn't borrow it, there is nothing illegal about having a license number written on a matchbook cover.

At page 90 of the record, Buckley testified that when he was in the apartment with Brady and SALADINI, it was with Brady that he dealt. SALADINI, he declared, was in and out of the two rooms and would walk from the living room to the kitchen back and forth the entire time.

At page 92 of the record, Buckley declared that he called SALADINI's home and when the appellant answered, he asked to speak to Brady. The conversation with respect to anything incriminating was with Brady and not SALADINI.

At page 96 of the record, another phone call to SALADINI's home, at which time again Buckley asked to speak to Brady.

Buckley testified that on February 29th his arrangements were with Richard, that is the informer, Brady and myself, meaning Buckley. He did not implicate SALADINI.

On March 8th (at page 118), it is Brady who has all the heroin.

At page 132 of the record we find that there is testimony that arrangements were made with Brady and not SALADINI. As a matter of fact, Buckley was specifically asked:

"Q. You made no arrangements with Mr. Saladini?

A. No.

Q. On March the 8th, the last day, did you make any arrangements with Mr. Saladini or were they again made with Mr. Brady?

A. They were made with Mr. Brady."

On page 137 Buckley declared that only on one occasion did he ever give money to SALADINI, and on that occasion it was with the understanding that he was to give it to Mr. Brady.

Buckley conceded, at page 137, that he was told that Brady was staying in SALADINI's apartment and was "not

paying any bills, not paying for the telephone, not paying for any rent or anything, . . .".

The Government, we believe, made error in adverting to the fact indirectly, that the defendant-appellant did not testify. In response to Mr. Weisband's argument that the Government did not call a handwriting expert with respect to the notations on the matchbook cover that was found in SALADINI's possession, the Government replied, in rebuttal, that the defense could have called a handwriting expert if they thought it would have been helpful.

The fact is, however, that the defense has no obligation to prove or disprove anything and, in essence, it is placing an unfair burden upon the defendant to have to explain away a fact which the prosecution has the exclusive burden of proof on.

We submit that this was error. (323)

At page 326, again error was committed. The Government inquired as to "what is the explanation, ladies and gentlemen, for Mr. Saladini walking on the street doing what agents described, as lookout for countersurveillance activities, doing that, what is the answer to that question?"

It must be recalled that SALADINI did not take the stand and therefore it was error for the Government to inquire as to what the explanation was.

We have included a copy of the defendant's Requests to Charge, with the rulings of the Court thereon.

We submit that the Court erred, especially in a case as close as this one, in refusing the Requests, which were denied herein.

CONCLUSION

The judgment of conviction should be reversed.

Respectfully submitted,

DAVID N. WEISBAND  
Assigned Counsel for Appellant



76 CR 488

#### IV. PRODUCTIVE COMMUNICATION

CANN. J. A. J.

7-8-76

Filed Judgment (Atty. David Weisband, present) The defendant is committed for imprisonment for a period of FIVE (5) YEARS on each of counts 1,2,3, & 4 to run concurrent with each other. Defendant is placed on Special Parole for a term of THREE (3) YEARS, to commence upon the expiration of confinement, pursuant to Title 21, U.S. Code, Sec. 841. ONE (1) YEAR on count 5 to run consecutive with each of counts 1,2,3 & 4. CANNELLA, J. Entered on: 7-9-76

Entered on: 7-9-76

7-8-76

Filed NOTICE OF APPEAL of DEFT to USCA 2nd Circuit from  
the Judgment entered on:7-8-76. Mailed copy to: atty.  
for Appellant,David N.Weisband,120 Broadway, NYC 10005  
Copy to US Atty.

7-15-76

Filed Transcript of Record of Proceedings - Dated 5-25-76

Jul 15-76

Filed transcript of record of proceedings dated May 19-1976.

Jul 22-76

Filed transcript of record of proceedings dated May 26-1976.

July 22-76

Filed transcript of record of proceedings dated May 27-1976.

3-1 23 76

Filed transcript of record of proceedings dated July 8- 976

JUL 22-70

filled transcript or record of proceedings dated July 1, 1976.

A TRUE COPY  
RAYMOND F. BURGHARDT, CLERK  
FV  
Deputy Clerk

B

## LINE AND RESTITUTION PAYMENTS

NAME OF TELEVISION STATION: **WBAL-TV** ADDRESS: **1300 E. 36TH ST.** BLDG. # **1** ROOM NUMBER: **100** MAIL NUMBER: **1**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

UNITED STATES OF AMERICA, :  
- - - - -

- v -

INDICTMENT

SERAFINO SALIDINI,  
JOHN BUCKLEY and  
JAMES BRADY, :  
- - - - -

S 76 Cr. 488

Defendants. :  
- - - - - x

The Grand Jury charges:

1. From on or about the 3rd day of January, 1976, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, SERAFINO SALIDINI, JOHN BUCKLEY and JAMES BRADY, the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York.

(1) On or about February 11, 1976, SERAFINO SALIDINI, JOHN BUCKLEY and JAMES BRADY, the defendants, met on 79th Street between East End Avenue and York Avenue, New York City, and had a conversation;

(2) On or about February 11, 1976, JOHN BUCKLEY, the defendant, entered a building at 436 East 76th Street, New York City;

(3) On or about February 20, JOHN BUCKLEY and JAMES BRADY, the defendants, met with an undercover agent of the Drug Enforcement Administration at East 79th Street, New York City, and sold him approximately 45.3 grams of heroin hydrochloride;

(4) On or about March 8, 1976, JOHN BUCKLEY, the defendant, met with an undercover agent of the Drug Enforcement Administration at 77th Street and First Avenue, New York City;

(5) On or about March 8, 1976, SERAFINO SALIDINI, the defendant, did carry a firearm in the vicinity of 77th Street and First Avenue, New York City.

(Title 21, United States Code, Section 846.)

COUNT TWO

The Grand Jury further charges:

On or about the 11th day of February, 1976, in the Southern District of New York, SERAFINO SALIDINI, JOHN BUCKLEY and JAMES BRADY, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 20.1 grams of heroin hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.)

COUNT THREE

The Grand Jury further charges:

On or about the 20th day of February, 1976, in the Southern District of New York, SERAFINO SALIDINI, JOHN BUCKLEY and JAMES BRADY, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 49.3 grams of heroin hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.)

COUNT FOUR

The Grand Jury further charges:

On or about the 8th day of March, 1976, in the Southern District of New York, SERAFINO SALIDINI, JOHN BUCKLEY and JAMES BRADY, the defendants, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I controlled substance, to wit, approximately 65.8 grams of heroin hydrochloride.

(Title 21, United States Code, Section 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.)

COUNT FIVE

The Grand Jury further charges:

On or about the 8th day of March, 1976, in the Southern District of New York, SERAFINO SALIDINI, JOHN BUCKLEY and JAMES BRADY, the defendants, did carry a firearm unlawfully during the commission of a felony for which they may be prosecuted in a court of the United States, namely, the felonies alleged in Counts One and Count Four of this Indictment.

(Title 18, United States Code, Sections 924(c)(2) and 2.)

Catherine Coogan Robert B. Fiske, Jr.  
Foreman ROBERT B. FISKE, JR.  
United States Attorney

27 1976 - JURY VERDICT DEF'T GUILTY  
on COUNTS 1-2-3-4-5 - JURY POLED  
PSI ORDERED - SENTENCE ON 7-2-76 AT 9<sup>1</sup>/<sub>2</sub> AM  
BAIL OF \$5,000 IS INCREASED TO \$50,000.00 (ASA) on SUSCT.  
DEF'T. REMANDED in CUST of BAIL  
H. Connell, T.

AMSA SCH 472  
JUL 8-1976 DEFT. SERAFINO SALIDINI (ATTY PRESENT) DAVID NEISBAND  
DEFT. SERAFINO SALIDINI (ATTY PRESENT) DAVID NEISBAND  
SENTENCED TO 5 yrs on each of counts 1-2-3 & 4 to run  
consec. to each other. DEFT. is placed on Spec. ~~up~~  
parole for a period of 3 yrs. to commence ~~up~~ upon  
the expiration of confinement, pursuant to T.21 USC  
Sec. 841.

**BEST COPY AVAILABLE**



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
UNITED STATES OF AMERICA :

-v- : DEFENDANT'S REQUEST TO  
CHARGE  
SERAPINO SALIDINU, :  
JOHN BUCKLEY :  
and JAMES BRADY, :  
Defendants. : 76 Cr. 268

-----x

AIDING AND ABETTING

1. You are instructed that before you may convict defendant of the crime of purposefully aiding and abetting another in the sale of narcotics, you must first be satisfied beyond a reasonable doubt that the defendant either had possession of those narcotics or knew that they had been illegally imported.

2. You are instructed that in order to convict the defendant as an aider and abettor, you may not apply the presumption that he knew that the drugs were imported unless you first find that he possessed the drugs. If you are not convinced of possession by proof which satisfies beyond a reasonable doubt, he must be acquitted.

POSSESSION

1. You are instructed that the mere presence of the defendant on property or in an apartment in which narcotics were located is insufficient to support a finding that he possessed narcotics.
2. You are further instructed that the mere association with people who control a narcotic drug or who control property on which a narcotic drug is found is also insufficient to support a finding of possession.
3. You are instructed that the defendant's knowledge of the presence of narcotics in a place which he did not own or control and which he infrequently visited is insufficient to establish possession of such narcotics.
4. You may not find the defendant guilty of the crime of possession of a narcotic drug unless you have been convinced beyond a reasonable doubt that he had knowledge of the presence of the drugs, that he exercised dominion and control over them, and that he had accessible and exclusive possession of them.
5. You are instructed that you may not infer that the defendant possessed narcotic drugs from the mere presence of such drugs on premises which he occupied jointly with another person. You must find him not guilty of the charge in the absence

of proof of his actual knowledge of the presence of the drugs and of his control over them.

6. You are further instructed that you may not find the defendant guilty on the theory of joint possession of the drugs by mere proof that he shared an apartment with one who actually possessed such drugs. The theory of joint possession also requires affirmative proof of actual possession of the drugs by the defendant.

7. You are instructed that a person who casually assists in a sale of narcotic drugs and who knows that a certain person possesses and trades in narcotics, but who lacks the working relationship with that person sufficient to insure delivery, cannot be held to have dominion and control over the drug delivered, and cannot be found guilty of illegal possession of that drug.

8. You are instructed that knowledge of the presence of narcotics is an indispensable element of the crime of possession of narcotics. The prosecution has the burden of establishing such knowledge by proof which satisfies you in a convincing manner, beyond a reasonable doubt.

#### POSSESSION WITH INTENT TO SELL

1. In order to convict defendant of the crime of possession of a narcotic drug you must first find that he had 29a.

possession. To possess means to control and to have it available for use. The prosecution must therefore establish control and availability. Next, the thing possessed must be a narcotic drug. The prosecution must establish that the thing possessed was a narcotic drug as defined in the applicable statute. If, after evaluating the testimony of the expert witnesses, you are not satisfied beyond a reasonable doubt that the item possessed was a narcotic drug, you must find the defendant not guilty. The final element is that the defendant must have intended to batter, sell, exchange, or give the narcotic drug to another person. The key here is intent.

2. "Intent" concerns the frame of mind of a person at the time of a particular act. You must determine intent by what a person says and by what he does. Intent is a mental process. It is proved by the facts and circumstances leading up to and surrounding the particular act. Obviously, intent is a secret and silent operation of the mind. A visible manifestation is the accomplishment or the attempted accomplishment of the act decided upon. An individual whose intent is sought to be ascertained may remain silent. Upon the question of intent, you may infer that a person intends to accomplish the necessary, natural, and probable consequences of his act.

3. The crime charged requires that you find an intent

to sell. This intention must be in the defendant's mind. If you are not satisfied that he had such an intent, you must acquit him.

PRESUMPTION OF INNOCENCE

1. The burden to overcome the presumption of innocence rests upon the government. The failure of any defendant to testify does not create any presumption of guilt against him. The defendant is never required to prove his innocence.

2. In investigating matters of fact and weighing evidence, you may not assume that the defendant is guilty and then attempt to reconcile the evidence with that theory of guilt. It is your sworn duty to presume the defendant's innocence and to give him the benefit of that presumption all through the trial and at every stage of your investigation of the evidence in the jury room until it is overcome, if it shall be overcome, by proof beyond a reasonable doubt.

3. If, upon a full consideration of all the evidence in this case, you entertain a reasonable doubt that the defendant is guilty of the crimes charged against him in the indictment, you must find him not guilty.

4. You are instructed that the indictment is not any evidence against the defendant, but is merely a formal charge

requiring proof by the prosecution of every material allegation, through the testimony of witnesses or by facts and circumstances. You are further instructed that the law presumes the defendant to be innocent of the crime charged until he has been proven guilty beyond all reasonable doubt.

5. The presumption of innocence is not an idle theory, to be cast aside by mere caprice, passion, or prejudice. It is a substantial part of the law of the land, it follows the defendant throughout the entire case, and it must not be lost sight of by you until it has been overcome by competent evidence which establishes his guilt beyond all reasonable doubt and to a moral certainty.

#### WEIGHT OF TESTIMONY

1. In weighing the testimony, you may consider the relationship of the witness to the government or to the defendant; the witness' bias or interest in the outcome of the case or in giving testimony; his or her manner while testifying; candor; intelligence as you observed the witness; the extent to which the witness' testimony was corroborated or contradicted by other credible evidence; inconsistencies within the testimony; any criminal record; any background that you are aware of; whether his testimony was induced by hope or promise of immunity from

criminal prosecution, leniency of prison sentence or any other reward; whether or not he or she has ever betrayed a trust imposed by any government or governmental agency; whether or not the testimony is based upon independent recollection or was suggested from reading notes or otherwise; the kind of testimony which may have been a recent fabrication; whether or not what was said on the witness stand was in an earlier statement; whether or not the testimony has been changed; and so on.

2. If you believe that any witness has wilfully lied to you on any particular matter, you can ignore that witness' testimony completely, but you do not have to, because we all know that witnesses may be mistaken or even may lie about particular matters and yet be trustworthy as to other matters.

3. The witness Buckley was, by his own admission, an accomplice, and an accomplice's testimony has to be considered very carefully by you. In the first place, he admits that he has committed a crime, and you can find that a person who has committed one crime may be more likely than others to commit perjury. In the second place, he may be amenable to a suggestion by the government because he is trying to court the prosecution's favor in return for avoiding some degree of punishment himself.

4. Certain of the prosecution's witnesses were admitted drug addicts. Their testimony should also be considered very carefully. You may find that such persons are unreliable or that they are amenable to suggestions because of their desire to remain at liberty and to support their habits. You must rely upon your common sense in evaluating the testimony of such witnesses and the weight to be given it.

Respectfully submitted,

David M. Schlesinger  
120 Broadway, New York, N.Y.  
Murch 2-3650

TO: CITIZEN ATTORNEY  
U. S. Attorney  
United States Courthouse Annex  
One St. Andrew's Plaza  
New York, N.Y.

5/26 1 bsr1 1  
pm session  
take 1 2

AFTERNOON SESSION

US v 3  
Salidini

2:45 p.m.

4 (In open court.)

5 THE COURT: Are you ready, gentlemen?

6 MR. SCHATZ: Actually, your Honor, could  
7 I be excused for one moment?

8 (Pause.)

9 MR. WEISBAND: Let the record indicate that I am  
10 handing Mr. Schatz a copy of defense requests to charge.

11 THE COURT: Don't bring in the jury then. I have  
12 to rule on them. Let me see them.

13 Illegal importation is no longer --

14 MR. WEISBAND: That should have been eliminated,  
15 your Honor.

16 My girl got this out in a hurry in my absence,  
17 your Honor, by reason of last night's circumstances.

18 THE COURT: I have a lot of requests here which  
19 I have not seen previously.

20 I am prepared to rule on them.

21 1 is denied.

22 2 is denied.

23 That is on the question of aiding and abetting.

24 The question of possession -- 1 is denied,  
25 2 is denied in the form requested. 3 is denied. 4,  
5, 6, 7, 8 are denied.

United States of America vs.

DEFENDANT

SERAFINO SALIDINI

United States District Court for

the SOUTHERN DISTRICT OF NEW YORK

DOCKET NO. 76 Cr. 499 (JMC)

DEFENDANT'S WAIVED PROBATION/COMMUNITY SERVICE ORDER

In the presence of the attorney for the government  
the defendant appeared in person on this date

MONTH DAY YEAR  
7 8 76

COUNSEL

WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

WITH COUNSEL David Weisband, Esq.

(Name of counsel)

PLEA

GUILTY, and the court being satisfied that  NOLO CONTENDERE,  NOT GUILTY  
there is a factual basis for the plea,

FINDING &  
JUDGMENT

Defendant has been convicted as charged of the offense(s) of unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substances, and did, carry a firearm unlawfully during the commission of a felony and conspiracy to do so. (Title 21, U.S. Code, Secs. 812, 841(a)(1) and 841(b)(1)(A) and Title 18, U.S. Code, Secs. 924(c)(2) and 2.)

SENTENCE  
OR  
PROBATION  
ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE(5) YEARS on each of counts 1,2,3 & 4 to run concurrent with each other. Defendant is placed on Special Parole for a term of THREE(3)YEARS, to commence upon the expiration of confinement, pursuant to Title 21, U.S. Code, Sec. 841. ONE(1)YEAR on count 5 to run consecutive with each of counts 1,2,3 & 4.

SPECIAL  
CONDITIONS  
OF  
PROBATION

ADDITIONAL  
CONDITIONS

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and

The court orders commitment to the custody of the Attorney General and recommends,

COMMITMENT  
RECOMMEN-  
DATION

SIGNED BY

U.S. District Judge  
 U.S. Magistrate

John M. Cannella

JOHN M. CANNELLA,

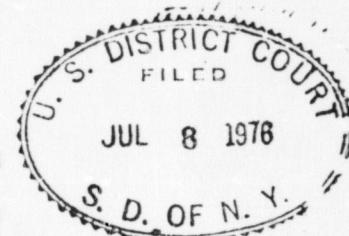
Date

7-8-76

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

RECORDED

JUL 9 1976



1 || ew ja

Buckley

17

2 you into taking this plea here today?

3 A No, sir.

4 Q Are you doing it of your own free will because  
5 you yourself feel you are guilty of this charge?

6 A Yes.

7 Q What are the acts which you feel you are guilty  
8 of as far as this charge is concerned? What did you do?

9           A        I picked up James Brady in my cab -- it was  
10            prearranged,    he had heroin on him -- and drove him to a  
11            restaurant where we were to meet the agents and sell it.

12 Q You didn't know he was an agent?

13 A No, sir.

Q He was an undercover man at that time?

15 A Right.

Q When did this happen, if you remember?

17 A Well, about March..

18 Q Was this this year?

19 A This year, sir, about March.

80 || 8 About March?

21 A OR February.

22 Q The 8th of February; does that refresh your  
23 recollection?

24 MR. SCHATZ: It's the 8th of March, your  
25 Honor.

2 New York and, you know, he wanted to come up and see me.

3 And I talked to Brady and Brady asked me if I  
4 had any company in the apartment, would I ask them to leave,  
5 that he wanted to talk about business.

6 Q What if anything did you say?

7 A I told him I could do that.

8 Q After the phone call what if anything happened?

9 A Well, Mr. Brady and Mr. Salidini came to the  
10 apartment and at that point Brady took out of his pocket,  
11 you know, some packets of heroin.

12 Q Where was Mr. Salidini at this point.

13 A He was in and out of the two rooms. He would walk  
14 from the living room to the kitchen, back and forth, you  
15 know, the entire time.

16 Q And what if anything happened at that point?

17 A He said it was better than --

18 MR. WEISBAND: May we know who says what?

19 A Okay. Brady said it was really good stuff, that  
20 he just got it, you know, from California, and if I was  
21 interested in dealing it for him he would give me the same  
22 deal he had given Mr. Salidini, that was that he would give  
23 me ten \$10 bags for \$70.

24 Q Did Mr. Salidini say anything?

25 A Yes, he did, you know, you can get the same

2 1976, did you have occasion to attract any business on that  
3 day?

4 A Yes, we did.

5 Q Direct your attention to the early evening, what  
6 if anything happened at that time?

7 A Well, I had made arrangements to meet Agent  
8 Sullivan. I didn't know he was an agent at the time, in  
9 the Apollo Restaurant on 89th Street and Second Avenue, and  
10 I met the agent and we talked for a while.

11 I asked him if he had the money with him to buy  
12 the heroin and he said he did and showed me the money.

13 At that point I called Mr. Salidini --

14 Q Did you have a discussion with Agent Sullivan as  
15 to any price at all?

16 A Oh, yes. I told him it would be \$1,300 an ounce.

17 Q Then what if anything did you do?

18 A At that point I called Mr. Salidini home and Mr.  
19 Salidini answered the phone and I asked to speak to Brady  
20 and Brady got on the phone.

21 He asked me, you know, did you see the money?

22 And he wanted to know if I knew who he was, and I said no,  
23 but Richie said he was all right, which was the friend who  
24 introduced me to him. You know, we just tried to make  
25 arrangements to sell it --

2 Avenue.

3 Q And you got back into the car, right?

4 A Right.

5 Q And then what did the car do?

6 A Well, he pulled down 79th Street to East End  
7 Avenue, made a right-hand turn and at that point the  
8 agent said -- he said, "There they are now," I hadn't seen  
9 them. He backed the car up. I saw Mr. Salidini and  
10 Mr. Brady coming out of a 500 building there, and the  
11 agent said, they are picking up a package or they are  
12 dropping a package, and I says, "I don't see anything,"  
13 and I started to get out of the car, but they waved me  
14 off, you know, like get out of here, so I hopped back in  
15 the car and told the agent, "Let's get out of here," and  
16 that's what we did.

17 Q What happened after that?

18 A We drove around for about a half hour, 45 minutes.  
19 Finally about 8:30 I called Mr. Salidini's house again  
20 and this time they were home. I asked them, you know --

21 Q Who did you speak to?

22 A Mr. Salidini. I asked him what is going on,  
23 are we going to do this thing or not, and he said, "You  
24 have to speak to Brady," and he put Brady on the phone,  
25 and at that point Jimmy asked me to go back to the car

2 the objection. Rephrase the question.

3 Q Were there any further conversations?

4 A "You know, you are making more than I am on this.

5 I haven't gotten a dime out of this." He said, "I hope

6 Jimmy, you know, takes care of business, he is supposed

7 to give me some money tonight, I hope he does it."

8 Q This is while you were walking?

9 A Yes.

10 MR. WEISBAND: I object to the reasons he had in  
11 his mind.

12 THE COURT: He said this while you were walking?

13 MR. WEISBAND: That is calling for a conclusion  
14 of this witness and I object to it.

15 THE COURT: Overruled.

16 A At that point we reached the corner of First  
17 Avenue and I said, "Listen, I got to go."

18 And he said, "Okay, take care of yourself and  
19 call me soon."

20 Q Now, Mr. Buckley, I direct your attention to  
21 February 20th --

22 THE COURT: That is another day, and we will start  
23 in with that this afternoon.

24 We will recess until 2:15. Please don't dis-  
25 cuss this case amongst yourselves nor with anyone else,

2 As to this particular question I sustain the  
3 objection. Rephrase the question.

4 BY MR. SCHATZ:

5 Q I will withdraw the question.

6 What happened when you entered the building?

7 A Well, we went in, there was like a courtyard,  
8 different entrances, and one on the left, we went in there.

9 I asked him, what are we doing here, he says,  
10 "I want to show you that I have got the full, you know,  
11 five ounces," so we went up a flight of stairs and he took  
12 the box and put it like on a windowsill and took the scale  
13 out of the box and put it on the stairs, and at that point  
14 I saw the balloon with what he said was heroin in it.

15 I asked him, "Are you sure that is heroin?"

16 And he says, "Well, I have never given you any-  
17 thing bad in the past," and so he began to weigh it out and  
18 to show me that there were five ounces.

19 Then we got -- he gave me two at that time  
20 so he wouldn't have to give it to me later on, and he put the  
21 scale back in the box and put the heroin back in the box and  
22 we left the building, got back in my car and I drove back  
23 around to First Avenue between 76th Street and 77th  
24 Street and I had arranged with the agent, Mr. Sullivan,  
25 to give him a signal how many ounces I had in advance, one,  
two, three, whatever it was, and I parked a bit behind

2 THE COURT: Thank you.

3 (In open court.)

4 BY MR. WEISBAND: .

5 Q Mr. Buckley, on February 20th you met with Mr.  
6 Brady, is that correct?

7 A That is correct.

8 Q Pardon?

9 A That is correct.

10 Q And Mr. Brady handed you various packets or foils  
11 of heroin, is that correct?

12 A Would you repeat the question?

13 Q And Mr. Brady handed you the various packets or  
14 foils of heroin, is that correct?

15 A That is correct.

16 Q Which he took from an attache case?

17 A Right.

18 Q And you in turn then gave it to Richie, was it?

19 A Yes.

20 Q Who in turn gave it to Mr. Sullivan?

21 A Right.

22 Q Is that right?

23 A That is correct.

24 Q On February 20th did you have any transaction at  
25 all with Mr. Salidini?

2 with Brady, is that correct?

3 A That is correct.

4 Q Did you give any money to Mr. Salidini?

5 A Only once.

6 Q Was it with the understanding that he was to  
7 give it to Mr. Brady?

8 MR. SCHATZ: Objection.

9 THE COURT: Overruled.

10 A That is correct.

11 Q That was only on one occasion, is that right?

12 A Yes.

13 Q As a matter of fact, Mr. Buckley, isn't it  
14 correct that Mr. Salidini said to you, "What am I getting  
15 out of this?" Is that right?

16 A That's true.

17 Q Did he also tell you that Brady was staying in  
18 his apartment, not paying any bills, not paying for the  
19 telephone, not paying for any rent or anything, is that  
20 right?

21 A That is true.

22 Q Mr. Buckley, if you know, do you know whether  
23 or not, during this period of time, February and March,  
24 and before, whether Mr. Salidini was on welfare? If  
25 you know.

1 bsa56

2 prepared to rest. Let me just check one thing.

3 (Pause.)

4 MR. SCHATZ: Yes, your Honor, at this  
5 point the government rests.

6 THE COURT: There is usually a period in  
7 between the time that the government rests and the time  
8 that the defendant makes a decision as to whether  
9 they are going to present any evidence.

10 As you know, I have told you that they don't  
11 need to if they don't desire to do so. However, this  
12 is a judgment for him to make.

13 So we will recess at this time because I  
14 will hear this in open court, it is a legal argument, it  
15 is not based on the facts -- that is, it is based on  
16 the facts, but it is a legal argument and it is not  
17 part of your judgment -- part of your job to make judg-  
18 ment on this part of the case.

19 As a matter of fact, I think I will do it  
20 right here at the side bar while you are here and then  
21 we can continue on instead of having you walk back and  
22 forth.

23 (At the side bar.)

24 THE COURT: Make your motions.

25 MR. WEISBAND: At this time the defendant

1 bsa57

2 respectfully moves to dismiss the indictment on the  
3 grounds there is no evidence tying the defendant in  
4 with the commission of any crimes committed by the defendant  
5 Brady or defendant Buckley.

6 As to the entire indictment, I would re-  
7 spectfully urge that at best the defendant was on the  
8 periphery and was not actually engaged in the possession with  
9 intent to sell of any controlled narcotic substance.

10 Additionally, that he did not aid or abet  
11 in the sale, if it were possession with intent to sell,  
12 of any narcotic substance.

13 Further, that insofar as the possession of the  
14 weapon is concerned, it is not a federal offense in  
15 that it was not possessed at the time of the commission of a  
16 federal crime.

17 Specifically, with respect to the counts  
18 of the indictment, I respectfully urge that the count  
19 with respect to the sale on February 20th, without  
20 referring to the specific count number --

21 MR. SCHATZ: That is count 3.

22 MR. WEISBAND: Whatever it is, that there  
23 is absolutely no evidence from any government witness  
24 tying in this defendant with any transactions conducted  
25 by any other defendant on that particular evening.

1 bsa58

2 With respect to the night of February 11th,  
3 I again respectfully urge that there is no evidence  
4 tying in this defendant with possession or possession  
5 with intent to sell of any narcotic substance, or any  
6 participation with any other defendant in the possession  
7 or the sale of any narcotic substance with intent to  
8 sell.

9 Similarly, with respect to the count con-  
10 cerning the evening of March 8, 1976, I respectfully  
11 move that be stricken or dismissed, there being no evi-  
12 dence whatsoever as to the defendant's involvement  
13 in the possession, sale of any narcotic substance that  
14 evening.

15 MR. SCHATZ: Do you wish to hear argument?

16 THE COURT: No. The court finds that  
17 there are sufficient facts as to each count in the  
18 indictment to present a jury question.

19 Under the circumstances the court denies  
20 the defendant's motions as to each count, 1 through 5  
21 inclusive, with an exception to the defendant.

22 MR. WELSBAND: I respectfully except.

23 THE COURT: Defendant rests?

24 MR. WEISBAND: Defendant rests.

25 THE COURT: You renew all motions?

1 bsr 2

2 As to the section possession with intent to  
3 sell.

4 1 is denied in the form requested, 2 is granted  
5 in substance. 3 is denied in the form requested.

6 As to the presumption of innocence, 1 is granted  
7 in substance, 2 is denied in the form requested. 3 is  
8 granted in substance. 4 is granted in substance. 5 is  
9 denied.

10 As to the weight of the testimony.

11 1 is denied in the form requested. 2 is granted  
12 in substance. 3 is granted with the deletion where  
13 it starts in the third sentence, "In the first place, he  
14 admits that he has committed a crime. . . ." down  
15 to "In the second place," otherwise it is granted in sub-  
16 stance.

17 No. 4 is granted in substance.

18 MR. WEISBAND: I respectfully except as to those  
19 denied, your Honor.

20 THE COURT: I may indicate that I had only about  
21 five minutes to look at this because I got them about five  
22 minutes ago and have been steadily going ever since we  
23 started this morning, even during the luncheon period,  
24 so I had very little time to really study these.

25 But I can understand why Mr. Weisband was a little

2 Salidini having the scale or any reference to Mr. Salidini  
3 having had anything to do with that scale.

4 On this March 8th date, when Buckley meets with  
5 Brady, who has all the heroin? Brady and only Brady, and  
6 I refer you, if you remember the testimony, to page 118.  
7 Brady states he has all the heroin.

8 Again, if you will recall, as far as Mr. Buckley  
9 is concerned, in response to my question, referring to page  
10 132, "On February 20th did you have any transaction at  
11 all with Mr. Salidini?

12 "A No.

13 "Q On February 11th, when you phoned Mr. Salidini,  
14 whom did you speak to primarily?

15 "A Mr. Brady.

16 "Q Were all your arrangements made with Brady?

17 "A That is correct."

18 That is Mr. Buckley's answer.

19 "Q You made no arrangements with Mr. Salidini?

20 "A No.

21 "Q On March the 18th, the last day, did you make any  
22 arrangements with Mr. Salidini or were they again made with  
23 Mr. Brady?

24 "A They were made with Mr. Brady."

25 Then again, if you will recall when I asked Mr.

